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7 THOMAS LEE FRITZ,  
8 Petitioner,  
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10 v.  
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12 UNITED STATES OF AMERICA,  
13 Respondent.

14 Case No. [15-cv-00645-DMR](#) (PR)

15 **ORDER REGARDING PETITIONER'S  
IN FORMA PAUPERIS MOTION;  
DENYING HIS MOTION FOR  
CONTINUANCE; AND DISMISSING  
PETITION WITH LEAVE TO AMEND**

16 Petitioner Thomas Lee Fritz has filed a *pro se* petition for a writ of habeas corpus on a  
17 form indicating it was filed under 28 U.S.C. § 2254. Petitioner has also filed a motion for leave to  
18 proceed *in forma pauperis*. Dkt. 6. In addition, he has filed a motion entitled, "Motion for a  
19 Continuance [sic]." Dkt. 7.

20 This action has been assigned to the undersigned Magistrate Judge.

21 Pursuant to 28 U.S.C. § 636(c), with written consent of all parties, a magistrate judge may  
22 conduct all proceedings in a case, including entry of judgment. Appeal will be directly to the  
23 United States Court of Appeals for the Ninth Circuit. *See* 28 U.S.C. § 636(c)(3).

24 On March 17, 2015, Petitioner consented to magistrate judge jurisdiction in this matter.  
25 Dkt. 5.

26 **I. BACKGROUND**

27 According to the allegations in the petition, Petitioner is currently in custody at the  
28 Elmwood Correctional Complex in Milpitas, California. Dkt. 1 at 2. However, he claims to be  
challenging a conviction and sentence imposed by a *federal* court in Texas. *Id.* He alleges he is  
serving a fourteen-month sentence ("time served long ago") and "1-3 years [of] probation" for an  
alleged "false conviction" of possession of obscene visual representations of the sexual abuse of  
children in violation of 18 U.S.C. § 1466A(b). *Id.* Petitioner does not indicate any dates relating

1 to his federal sentence. A search of the court's Public Access to Court Electronic Records  
2 ("PACER") system has revealed that Petitioner's aforementioned federal conviction stemmed  
3 from an offense which ended in "November 2012," resulting in a guilty plea on November 13,  
4 2013 and his re-sentencing on March 6, 2014. *See* Dkt. 105 in United States District Court for the  
5 Western Division of Texas Case No. SA-12-CR-1082(1)-OLG. Petitioner claims that he has  
6 served fifteen months of probation with "no infractions, no 'dirty' samples" and that he has been a  
7 "poster boy for [a] model probationer." *Id.* at 6. He adds that he has served "27 months of solid  
8 incarceration," which is "well beyond the Judge[']s original order." *Id.* Petitioner asks for  
9 "termination of probation." *Id.*

10 As mentioned above, Petitioner has also filed a "Motion for a Continueance [sic]," in  
11 which he indicates that he is facing criminal charges in California. Dkt. 7 at 1. Petitioner claims  
12 that his California case, C 1361775, "should be in April 13, 2015, et seq." but he fails to elaborate  
13 what this means. Petitioner states that in his California case, he "will be using all evidence, in  
14 defense which the FBI & Federal Prosecutor's Office, knew about in December 2012." *Id.*  
15 Petitioner adds that he "expect[s] not only to be found 'not guilty' but a landslide victory against  
16 the D.A. of Santa Clara County . . . proving [his] innocence, and the Federal Prosecutor[']s  
17 Office[']s gross misconduct of the power entrusted by the people." *Id.* Petitioner requests a  
18 continuance in order to "give the criminal court of California a chance to exonerate [him], and to  
19 get a certified copy of their transcripts as evidence." *Id.* at 2. The court DENIES Petitioner's  
20 motion for a continuance as it is unclear whether his pending California case has any bearing on  
21 the instant petition, which challenges his federal sentence. As further explained below, the court  
22 will direct Petitioner to file an amended petition.

23 In the instant petition, Petitioner does not specify exactly what charges he faces in  
24 California. However, the court notes that in a previously-filed habeas action, Petitioner had  
25 indicated that he pleaded "not guilty" to multiple charges, including violations of the following  
26 sections from the California Penal Code: § 269 (Aggravated Sexual Assault of a Child);  
27 § 288(b)(1) (Lewd or Lascivious Acts on a Child By Use of Force); §288.2(b) (Harmful Matter  
28 Sent With Intent of Seduction of Minor); and §311.11(a) (Possession or Control of Matter

1 Depicting Minor Engaging or Simulating Sexual Conduct). *See* Dkt. 1 in Case No. 14-4216 DMR  
2 (PR) at 2. Because Petitioner stated that he had a state habeas petition still pending before the  
3 state superior court at that time, his previously-filed petition appeared to be unexhausted for  
4 purposes of federal habeas corpus review. Therefore, the court dismissed his previously-filed  
5 petition with leave to amend for Petitioner to file an amended petition which clarified the nature  
6 and exhaustion status of all claims which he sought to raise in his federal petition. Dkt. 5 in Case  
7 No. 14-4216 DMR (PR). Because Petitioner failed to file a timely amended petition, his previous  
8 action was dismissed without prejudice for failure to prosecute. Dkt. 7 in Case No. 14-4216 DMR  
9 (PR).

10 **II. DISCUSSION**

11 The court may entertain a petition for a writ of habeas corpus “in behalf of a person in  
12 custody pursuant to the judgment of a State court only on the ground that he is in custody in  
13 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a); *Rose v.*  
14 *Hedges*, 423 U.S. 19, 21 (1975). A district court shall “award the writ or issue an order directing  
15 the respondent to show cause why the writ should not be granted, unless it appears from the  
16 application that the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243; *see*  
17 Rule 4, Rules Governing Section 2254 Cases. Summary dismissal is appropriate where the  
18 allegations in the petition are vague or conclusory, palpably incredible, or patently frivolous or  
19 false. *See Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (quoting *Blackledge v. Allison*,  
20 431 U.S. 63, 75-76 (1977)).

21 If Petitioner intends to proceed with the above-titled action he must file an amended  
22 petition, as the court is unable to conclude from the allegations in the instant petition whether he  
23 states cognizable claims for habeas corpus relief. Specifically, Petitioner has not provided, either  
24 in the spaces designated on the petition form, or in any attachments thereto, more specific facts  
25 regarding his case. In addition, Petitioner seems to be challenging his *federal* conviction under 28  
26 U.S.C. § 2254 instead of indicating that it was filed under either 28 U.S.C. § 2241 or 28 U.S.C.  
27 § 2255.

28 The plain text of 28 U.S.C. § 2241 and 28 U.S.C. § 2254 are similar. *White v. Lambert*,

1 370 F.3d 1002, 1005-06 (9th Cir. 2004), *overruled on other grounds by Hayward v. Marshall*, 603  
2 F.3d 546 (9th Cir. 2010). Section 2241 authorizes “a district court to issue a writ of habeas corpus  
3 when a federal or state prisoner establishes that he ‘is in custody in violation of the Constitution or  
4 laws or treaties of the United States.’” *Id.* at 1006 (citing 28 U.S.C. §§ 2241(a) and (c)(3)). As  
5 explained above, the relevant subsection of 28 U.S.C. § 2254 authorizes a district court to issue  
6 ““a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a *State*  
7 *court* . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of  
8 the United States.”” *Id.* (citing 28 U.S.C. § 2254(a)) (emphasis added). Section 2254 implements  
9 “the general grant of habeas corpus authority found in § 2241, as long as the person is in custody  
10 pursuant to the *judgment* of a state court, and not in state custody for some other reason, such as  
11 pre-conviction custody, custody awaiting extradition, or other forms of custody that are possible  
12 without a conviction.” *Id.* (emphasis in original).

13 Meanwhile, a prisoner in custody under sentence of a *federal* court who wishes to attack  
14 collaterally the validity of his conviction or sentence must do so by way of a motion to vacate, set  
15 aside or correct the sentence pursuant to § 2255 in the court which imposed the sentence. *See*  
16 *Tripati v. Henman*, 843 F.2d 1160, 1162 (9th Cir.), *cert. denied*, 488 U.S. 982 (1988). Only the  
17 sentencing court has jurisdiction. *See id.* at 1163. A prisoner may not attack collaterally a federal  
18 conviction or sentence by way of a petition for a writ of habeas corpus pursuant to 28 U.S.C.  
19 § 2241.<sup>1</sup> *See Grady v. United States*, 929 F.2d 468, 470 (9th Cir. 1991) (challenge to sentence  
20 following probation or parole revocation must be brought in sentencing court via § 2255 motion);  
21 *Tripati*, 843 F.2d at 1162 (challenge to legality of conviction must be brought in sentencing court  
22 via § 2255 motion); *see also United States v. Flores*, 616 F.2d 840, 842 (5th Cir. 1980) (where  
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25 <sup>1</sup> There is an exception to this general bar: A federal prisoner authorized to seek relief  
26 under § 2255 may seek relief under § 2241 if he can show that the remedy available under § 2255  
27 is ““inadequate or ineffective to test the legality of [his] detention.”” *United States v. Pirro*, 104  
28 F.3d 297, 299 (9th Cir. 1997) (quoting 28 U.S.C. § 2255). The Ninth Circuit has recognized that  
this is a very narrow exception. *See id.* For example, the remedy under § 2255 generally will not  
be inadequate or ineffective due to delay in considering a motion under § 2255, *see id.* at 299  
(district court’s delay in considering § 2255 motion until direct appeals are resolved does not make  
§ 2255 motion inadequate or ineffective), or mere fact that a previous § 2255 motion was denied,  
*see Aronson v. May*, 85 S. Ct. 3, 5 (1964); *Tripati*, 843 F.2d at 1162-63.

1 challenge is to alleged errors at or prior to sentencing remedy is § 2255 motion, not § 2241 writ).

2 Here, Petitioner makes reference to *both* his federal conviction and his pending California  
3 charges. The court had to resort to gathering more information by conducting a search on PACER  
4 for his federal conviction, and by reviewing his previously-filed petition for his California charges.  
5 The court also assumes that if Petitioner was on probation for his federal conviction while facing  
6 pending charges in California, then he may also be facing violation of probation charges.

7 However, Petitioner makes no mention of allegations of probation violation in the instant petition.

8 Further, Petitioner states he has been incarcerated for “27 months,” but he does not specify  
9 whether he is in custody pursuant to his federal sentence, his pending California charges, or both.

10 The court notes that instead of naming the warden or sheriff in charge of his place of incarceration  
11 as the Respondent in this action, Petitioner has named the “United States of America.” Dkt. 1 at 1.

12 Finally, Petitioner has not indicated whether he exhausted appropriate judicial and/or  
13 administrative remedies before filing the instant petition. Consequently, the petition fails to set  
14 forth sufficient information for the court to discern whether jurisdiction and venue are proper in  
15 the United States District Court for the Northern District of California, let alone for the court to  
16 order any named respondent to show cause. *See Hendricks*, 908 F.2d at 491-92 (holding petitioner  
17 must state claims with sufficient specificity to enable respondent to prepare a response).

18 Moreover, it is unclear whether Petitioner intends to file a motion under § 2255, or a  
19 petition under § 2241 or § 2254. If Petitioner had intended to request the termination of his  
20 *federal* probation, then it would seem that he should have filed a motion under § 2255. Petitioner  
21 may not seek habeas relief from this court under § 2255. He may seek relief under § 2255 only in  
22 the sentencing court, i.e., United States District Court for the Western Division of Texas. The  
23 § 2255 motion must include the caption and case number used in his criminal case, Case No. SA-  
24 12-CR-1082(1)-OLG. If instead Petitioner seeks to challenge the execution of his federal  
25 sentence, he may do so by filing the enclosed form for a petition under 28 U.S.C. § 2241. Finally,  
26 if Petitioner wishes to challenge any resulting conviction in Santa Clara County stemming from  
27 his California case, then he must file a new petition under § 2254 in a separate action but *only*  
28 *after* exhausting his state court remedies.

1        In sum, Petitioner will be given leave to file an amended petition to correct the deficiencies  
2 noted above. Depending on how Petitioner wishes to proceed, he must complete the proper form  
3 in its entirety and provide all of the information required therein. The amended petition  
4 supersedes the initial petition and may not incorporate any part of it by reference. Petitioner must  
5 include in the amended petition all the claims he wishes to present, and any attachments he wishes  
6 the court to consider. If Petitioner fails to timely amend the petition as ordered herein, the petition  
7 will be dismissed without prejudice.

8        **III. CONCLUSION**

9        For the foregoing reasons, the court orders as follows:

10        1.        Petitioner's *in forma pauperis* application is DENIED because he has more than  
11 sufficient funds to pay the filing fee. Dkt. 6. Petitioner must pay the \$5.00 filing fee for this  
12 habeas action no later than **twenty-eight (28) days** of the date of this Order. **The failure to pay**  
13 **the filing fee within the twenty-eight-day deadline will result in dismissal of this action**  
14 **without prejudice.**

15        2.        Petitioner's "Motion for a Continueance [sic]" is DENIED. Dkt. 7.

16        3.        The petition is DISMISSED with leave to amend. The amended pleading must be  
17 simple and concise. Petitioner shall write the correct caption and case number for this action—  
18 Case No. C 15-0645 DMR (PR)—on the form, and clearly label it "Amended Petition." Petitioner  
19 may file an amended petition, as set forth above, no later than **twenty-eight (28) days** of the date  
20 of this Order. **The failure to do so will result in the dismissal of this petition without**  
21 **prejudice and without further leave to amend.**

22        4.        Petitioner may use one of the enclosed forms, completed in full. As explained  
23 above, he may either: (a) seek relief under § 2255 in United States District Court for the Western  
24 Division of Texas and include the caption and case number used in his criminal case, Case No.  
25 SA-12-CR-1082(1)-OLG; (b) challenge the execution of his federal sentence by filing the  
26 enclosed form for a petition under 28 U.S.C. § 2241; or (c) challenge any resulting conviction in  
27 Santa Clara County stemming from his California case by filing a new petition under § 2254 in a  
28 separate action but *only after* exhausting his state court remedies.

1       5. It is Petitioner's responsibility to prosecute this case. Petitioner must keep the  
2 court informed of any change of address and must comply with the court's orders in a timely  
3 fashion. Pursuant to Northern District Local Rule 3-11 a party proceeding *pro se* whose address  
4 changes while an action is pending must promptly file a notice of change of address specifying the  
5 new address. *See* L.R. 3-11(a). The court may dismiss a *pro se* action without prejudice when:  
6 (1) mail directed to the *pro se* party by the court has been returned to the court as not deliverable,  
7 and (2) the court fails to receive within sixty days of this return a written communication from the  
8 *pro se* party indicating a current address. *See* L.R. 3-11(b); *see also Martinez v. Johnson*, 104  
9 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

10       6. The Clerk of the Court shall send Petitioner blank forms for the following: a § 2255  
11 motion, a petition for a writ of habeas corpus under 28 U.S.C. § 2241, and petition for a writ of  
12 habeas corpus under 28 U.S.C. § 2254.

13       7. This Order terminates Docket Nos. 6 and 7.

14       IT IS SO ORDERED.

15       Dated: 4/17/2015



16       DONNA M. RYU  
17       United States Magistrate Judge

United States District Court  
Northern District of California